> "Thus, this term in Richfield Oil Corporation v. State Board of Equalization, *supra,* despite the fact that the Supreme Court of California had reversed a judgment without directions, we determined on the entire record and upon an independent investigation of California law that the judgment was final for the purposes of § 237. In the first place, the facts had been stipulated and, so far as appeared, the stipulation would have been available and controlling upon a second trial. In the second place, the suit was one for a refund of a tax and under California law only those grounds presented in the prior claim for refund could be urged in the suit."[1]

To the same effect are: *Radio Station W. O. W. v. Johnson,* 326 U. S. 120, 124-127 (1945); *Richfield Oil Company v. State Board of Equalization,* 329 U. S. 571, 576 (1946); *Parker v. People,* 333 U. S. 571, 586 (1948).

When Federal questions have been adjudicated by a state court so as to control all further state proceedings and no new Federal questions can arise nor action be taken therein which would nullify adverse effects of prior determinations of Federal law, such state judgment is "final." Particularly is this true if further proceedings are primarily mathematical or ministerial in character.

The state court below finally determined five Federal questions (Petition p. 4) applicable herein and based thereon ordered the limited recovery complained of by Petitioners. These determinations will be binding in all later proceedings in the state courts. No further Federal questions can be raised. Adverse effect of erroneous rulings on Federal Statutory and Constitutional law cannot be re-

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[1]The California rule is the same in suits for recovery of taxes paid under protest. The taxpayer therein is limited to the "grounds specified in the protest." Revenue and Taxation Code Section 5139 (see Petition Appendix p. 4 for complete text).

moved by further acts of the trial court. Further proceedings directed are only to compute, by ministerial act, exact amounts of judgments ordered. Thus the trial court is directed to secure an administrative separation of the bank fixture value from that of the building and multiply it by the uncontested special assessment tax rate. The resulting sum is the ordered judgment in each case.

Republic Natural Gas Co. v. State of Oklahoma, 334 U. S. 62 (decided the same day as *Parker v. People, supra,* p. 1), the only recent authority cited by Respondents, is not opposed to the rule. It represents its narrow application in eminent domain and similar cases in which, unlike these proceedings, a litigant seeks to review in this Court the right to take property prior to the taking and prior to judicial determination of damages to be paid. On such facts, this Court has recognized that Federal questions arising in subsequent proceedings are usually as serious as in the first and that, human nature being what it is, a large award of damages may well remove the litigant's desire to raise any Federal questions.[2]

In this case, contrary to Petitioners' contentions, the court below has held them entitled to recovery from

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[2]In *Republic Natural Gas Co. v. State of Oklahoma,* 334 U. S. 62, 71-72, Frankfurter, J., speaking for a majority of this Court said:

> "in an eminent domain case, as in a case like this, the fate of the whole litigation may well be affected by the fate of the unresolved contingencies of the litigation. An adequate award in an eminent domain case or a profitable rate in the case before us might well satisfy the losing party to acquiesce in the disposition of the earlier issue. . . .
>
> "The policy against fragmentary review has therefore little bearing. But contests over valuation in eminent domain cases, as price-fixing in this type of case, are inherently provocative of constitutional claims. This potentiality of additional federal questions arising out of the same controversy has led this Court to find want of the necessary finality of adjudicated constitutional issues in condemnation decrees before valuation has been made."

Respondents only what the latter concede is a "comparatively nominal" judgment (p. 5). Furthermore, as pointed out by Respondents (p. 4), all that is further required is separation of the "fixture portion of the building" and application mathematically thereto of the special assessment tax rate. The judgment so providing is "final" under Section 237(a).

2. Petition Seeks Only to Review a Single Judgment of the Court Below.

Federal questions sought to be reviewed in this proceeding were disposed of by the California Supreme Court in a single written opinion [R. 317-330] and by a single docketed judgment of that court [R. 331]. A single petition for rehearing was filed below [R. 332-438] and was denied by single order of the California court [R. 439]. On these facts Respondents' Answer (p. 8) concedes the propriety of a "single petition and single record" but objects to the prayer for a "single writ."

In *First National Bank of Shreveport v. Louisiana Tax Commission,* 289 U. S. 60, 62, this Court on the more technical situation of appeal expressly held that there had been effective consolidation by similar acts of a State Supreme Court. It therefore denied a motion to dismiss the appeal made upon the ground that separate causes could not be reviewed by single appeal.

3. Federal Questions Raised Are Important and Substantial.

In an attempt to show that Federal questions raised by the Petition are unimportant and unsubstantial, Respondents' Answer states that Petitioners seek only to review of "a local deviation" from "a long-established state rule that fixtures are improvements and hence taxable as real property." In both respects such statement is factually incorrect.

Full importance of Federal questions raised by this Petition flows from the holding of the California Court that a state has power, under both R. S. 5219 and the Fourteenth Amendment, to tax national bank fixtures as real property while taxing all similar fixtures as personal property. Such determination affects not only all national banks but substantially all Federal agencies. The organic acts creating most Federal agencies include substantially similar tax provisions to those, in this respect, contained in R. S. 5219. (See Petition, footnote 3, pp. 10-11, for partial enumeration of such agencies with reference to organic statutes involved).

This is a test proceeding [R. 223] for "approximately seven hundred cases of like character that are now on file for the tax years 1941 to 1946, inclusive" in Los Angeles County, brought by all principal national banks and their landlords in said County. It is also a test case controlling five hundred other suits involving taxes levied in six other California Counties over the period 1941 to 1949, inclusive, wherein the same discriminatory practices are alleged to have been followed by other local assessment officials. Abandonment of discriminatory practices in Los Angeles County since 1946, asserted in the Answer (pp. 16-17), or adoption by the California Legislature of specific statute to prevent future violation of the Fourteenth Amendment in assessing buildings owned by landlords of national banks one way, and all other buildings another, in nowise minimize the importance or substantiality of Federal questions presented.

Neither was there, prior to the assessment and levy of the taxes involved herein, any "long-established" California rule requiring fixtures to be classified as improvements for tax purposes. It is true that Revenue and Taxation Code Sections 104 and 105 have existed in substantially their

present form for approximately eighty years. However, fixtures of the character of bank vault doors and counterlines were much later regarded as personal property for tax purposes and therefore, if owned by national banks, exempt from local taxation under R. S. 5219.[3] As late as 1906[4] the California Supreme Court expressly held that general rules as to what constituted personal property between individuals controlled for purposes of taxation. In 1909[5] the California courts held that a bank vault door installed by a bank lessee was a trade fixture and hence personal property. Both decisions were so palpably opposed to the present tax rule announced in 1946 in the *final* decision in the *Trabue-Pittman Case*[6] that the California Supreme Court therein expressly overruled the first and distinguished the second as not applicable for tax purposes. Complete lack of certainty in California tax law is indicated by the judicial history of the *Trabue-Pittman Case*. The first appellate decision rendered therein on July 24, 1945 held *both* vault doors and counterlines to be *personal property* and *exempt* from taxation under R. S. 5219.[7] The first Supreme Court decision therein rendered on April 9, 1946 held bank counterlines, because they were trade fixtures, to be *personal property* and *exempt* from state taxation although it took a contrary position as to vault doors. It was not until the final decision therein on December 10, 1946, after all taxes involved herein had been assessed, levied and collected (except as to the second half of taxes

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[3]*First National Bank of San Francisco v. San Francisco*, 129 Cal. 96, 61 Pac. 778 (1900); *San Francisco v. Crocker-Woolworth Building*, 92 Fed. 273 (1899).

[4]*Western Union Telegraph Co. v. Modesto Irrigation Co.*, 149 Cal. 662, 87 Pac. 190 (1906).

[5]*Woods v. Bank of Hayward*, 10 Cal. App. 93, 106 Pac. 730 (1909).

[6]29 C. (2d) 385, 400, 398.

[7]161 P. (2d) 10.

for 1946, the last year in controversy), that the "rule" referred to by Respondents in their Answer was definitely established in California.

Even in the *Trabue-Pittman Case* this "rule" was coupled with the caution that it could *not* be applied if there resulted "discrimination against Federal instrumentalities." Since the court therein expressly withheld consideration as to whether or not discrimination had occurred in Los Angeles County in the year 1941,[8] it was not until the decision below that California applied Respondents' "rule" regardless of conceded discrimination in its application to national bank fixtures. There is thus no doubt that Federal questions presented on the Petition are of extreme importance, substantial in character, and fully warrant review by this Court.

4. Judgment Below Cannot Be Rested Upon Adequate Independent State Grounds.

The Answer (pp. 17-18; 20-22; 23-24) asserts that the judgment below can be sustained upon adequate independent grounds of State law. Erroneous and inadequate as was the consideration by the California Supreme Court of the Federal questions involved in this case, it never claimed that its decision rested upon independent grounds of State law.

The now suggested grounds of State law are obviously inapplicable and inadequate. Discriminatory or double-taxation resulting from application of an additional tax on national bank income, expressly designed to compensate for exemption from local taxation of bank-owned personal property composed in part of vault doors and counter-lines, when such were taxed locally to the banks as improvements, is certainly not answered by asserting that

[8] 29 C. (2d) 385, 388.

the banks can recover the additional tax on their income from the State. On similar facts, and without more extensive record than here, such argument was rejected by this Court in *Hopkins v. Southern California Telephone Co.*, 275 U. S. 393, 403. At most, such assertion goes to but one of the three grounds upon which the bank petitioner seeks *certiorari.*

Again, it is inadequate to suggest, contrary to the trial court findings [R. 83], that national bank landlords could, or did, protect themselves against the discriminatory tax by lease covenant with their national bank lessees. Such argument was expressly rejected in *United States v. Allegheny County*, 322 U. S. 174, 189.

The assertion that, as tax refund suits are governed by equitable principles, the California Supreme Court could disregard without denial of due process of law under the Fourteenth Amendment, a state statute which prescribed the form and amount of judgment, is obviously fallacious. "It can never be emphasized too much" that a court's "own opinion as to the wisdom of the law must be wholly excluded" in the performance of "judicial duty." *Osborn v. Ozlin*, 310 U. S. 53, 66. Whatever principles of equity or of state "policy" were involved therein, the Legislature having prescribed the nature of the judgment, a withholding thereof presents a denial of due process of law. Such question was clearly raised by Petitioners at their first opportunity since the trial court scrupulously complied in its judgment with all applicable statutes, including the California Reassessment Statute (Petition, Appendix pp. 5-7) which is designed to give ultimate relief to public bodies in cases such as this.

Respectfully submitted,

W. SUMNER HOLBROOK, JR.,
EDMUND NELSON,
Counsel for Petitioners.

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 361

W. J. SIMMS, WILLIAM S. ROSECRANS, EDWARD W. COST, ET AL., PETITIONERS

v.

COUNTY OF LOS ANGELES, A BODY CORPORATE AND POLITIC, AND CITIES OF GARDENA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

MEMORANDUM FOR THE UNITED STATES, AMICUS CURIAE, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The federal question decided by the Supreme Court of California is substantial and important. The statutory provision involved is similar to those relating to many other federal agencies[1] and it

[1] Section 5219, Revised Statutes of the United States (12 U.S.C. 1946 ed., Sec. 548), provides, in pertinent part, that "Nothing herein shall be construed to exempt the real property of [national bank] associations from taxation in any State or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed." This provision stems

is not unlikely that the decision in this case will invite other state and local taxing authorities to follow the course taken by California.

In California alone, with which the present litigation is concerned, the Reconstruction Finance Corporation has a very large investment in plants, plant sites, machinery and equipment. We are advised by the Reconstruction Finance Corporation that it has, in the past, suffered discriminations much like those imposed by California on national bank property, and that its operations are being substantially increased because of the present international situation. As a result of the decision of the court below, the R.F.C. fears that it will be

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from the Act of June 3, 1864, c. 106, 13 Stat. 99, Sec. 41, which authorized the creation of national banking associations. Subsequent statutes submitting federally-owned real property to state and local taxation, including Section 10 of the Reconstruction Finance Corporation Act of January 22, 1932, c. 8, 47 Stat. 5, 9, as amended by Section 3 of the Act of June 10, 1941, c. 190, 55 Stat. 248 (15 U.S.C. 1946 ed., Sec. 610), seem to have been based upon the above clause in Section 5219, Revised Statutes of the United States. Among such statutes are the Federal Farm Loan Act, c. 245, 39 Stat. 360, Sec. 26 (12 U.S.C. 1946 ed., Secs. 931, 933) (1916); Agricultural Credits Act of 1923, c. 252, 42 Stat. 1454, Sec. 211 (12 U.S.C. 1946 ed., Sec. 1261) (1923); Federal Home Loan Bank Act, c. 522, 47 Stat. 725, Sec. 13 (12 U.S.C. 1946 ed., Sec. 1433) (1932); Home Owners' Loan Act of 1933, c. 64, 48 Stat. 128, Sec. 4 (12 U.S.C. 1946 ed., Sec. 1463(c)) (1933); Banking Act of 1933, c. 89, 48 Stat. 162, Sec. 8 (12 U.S.C. 1946 ed., Sec. 264 (p)) (1933); Federal Farm Mortgage Corporation Act, c. 7, 48 Stat. 344, Sec. 12 (12 U.S.C. 1946 ed., Sec. 1020f) (1934); National Housing Act, c. 847, 48 Stat. 1246, Secs. 208, 307, 402 (12 U.S.C. 1946 ed., Secs. 1714, 1722, 1725(e)) (1934); Act of March 8, 1938, c. 44, 52 Stat. 107, Sec. 5 (15 U.S.C. 1946 ed., Sec. 713a-5) (1938); Act of March 28, 1941, c. 31, 55 Stat. 55, Sec. 1 (12 U.S.C. 1946 ed., Sec. 1741) (1941).

faced with an increasingly troublesome administrative problem as well as possible protracted and expensive litigation in relation to Section 10 of the Reconstruction Finance Corporation Act of January 22, 1932, c. 8, 47 Stat. 5, 9, as amended by Section 3 of the Act of June 10, 1941, c. 190, 55 Stat. 248 (15 U.S.C. 1946 ed., Sec. 610). Numerous other federal agencies individually will have similar problems. Collectively their problems will attain very substantial proportions.

Under these circumstances, it is desirable that the scope of paragraph 3 of Section 5219, Revised Statutes of the United States, be definitely determined by this Court. Only by such determination will a multiplicity of suits be avoided and the several federal agencies affected be afforded a guide for an orderly administrative practice with respect to state and local taxation of their real property.

This case presents, we think, an instance in which an assessor has applied a state rule so as to "effect a discrimination against the Government" and has applied the state rule in such a way as to make it "patently run counter to" the federal statute. *Reconstruction Finance Corp.* v. *Beaver County*, 328 U. S. 204, 210.

The principle of equal tax burdens resorted to by the court below in reaching its conclusion of nondiscrimination is wholly inconsistent with a practical or reasonable construction of paragraph 3 of Section 5219. It seems entirely unreasonable to assume that, in providing for state and local taxa-

tion of the real property of national banks, Congress consented to state and local taxation of *any* property of national banks which a local assessor, or state law, classifies as real estate, even if similar property of others is classified as personal property. When, for whatever reason, private property is classified as personalty, like national bank or federal property cannot, consistently with the statute, be made to bear the tax from which it would be free if it, like comparable private property, were classed as personalty.

In the enactment of paragraph 3 of Section 5219, Congress provided a clear, simple and satisfactory method for the submission of the real property of national banks to state and local taxation: (1) that the real property be such under the law of the taxing state (*Reconstruction Finance Corp.* v. *Beaver County, supra*), and (2) that it be taxed "to the same extent according to its value, as other real property is taxed." This obviously conditional Congressional consent to state and local taxation is unqualified and seems not to have been met by the assessments here in issue. That the end result of the assessments might have brought about an equality of tax burdens as determined by resort to tables, formulae, variable standards and oral and documentary evidence is not sufficient to bring the assessments within the scope of the Congressional consent. Congress provided no such complicated standard. It provided a single and simple rule that the real property of national banks could be taxed

"to the same extent, according to its value" by the states, and their subdivisions, "as other real property" in the state "is taxed." Congress did not contemplate or consent to taxation in such a case dependent on a complicated determination of an equality of tax burdens within one field of state taxation, or in another, or within both of such fields. The decision below, in reaching contrary results in the fields of local taxes and special assessment charges, demonstrates the variable, if not capricious, conclusions invited by adherence to the principle of tax equivalence adopted by the court below as basic.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

NOVEMBER, 1950

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 361

W. J. SIMMS, WILLIAM S. ROSECRANS, EDWARD W. COST, CARRIE D. GRIBBLE, ZELLA Z. MCCOMB, MERCHANTS NATIONAL REALTY CORP., a corporation, and SECURITY-FIRST NATIONAL BANK OF LOS ANGELES, a national banking association, *Petitioners,*

vs.

COUNTY OF LOS ANGELES, a body corporate and politic, and CITIES OF GARDENA, VERNON, MONTEREY PARK, and CLAREMONT, municipal corporations, *Respondents.*

No. 362

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES, a national banking association, *Petitioner,*

vs.

COUNTY OF LOS ANGELES, a body corporate and politic, and CITY OF VERNON, a municipal corporation, *Respondents.*

On Petition for a Writ of Certiorari to the Supreme Court of the State of California.

AMICUS CURIAE BRIEF ON BEHALF OF CALIFORNIA BANKERS ASSOCIATION IN SUPPORT OF THE PETITIONS.

WILLIAM L. HOLLOWAY,

C. COOLIDGE KREIS,

Crocker Building, San Francisco 4, California,

Amicus Curiae on Behalf of California Bankers Association.

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IN THE

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On Petition for a Writ of Certiorari to the Supreme Court of the State of California.

AMICUS CURIAE BRIEF ON BEHALF OF CALIFORNIA BANKERS ASSOCIATION IN SUPPORT OF THE PETITIONS.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Pursuant to written consent of both parties, this brief is filed on behalf of the California Bankers Association in support of petitions for *certiorari* filed herein.

These cases involve basically the power of a subdivision of the State of California to tax "real property" of a national bank in accordance with terms of the limited Congressional consent under 12 U.S.C. 548 (R.S. 5219) permitting state taxation only "to the same extent, according to its value, as other real property is taxed." Heretofore, it has been unquestioned by this Court, and by Courts of the various states that *power* of a state to tax national bank "real property" exists *only* if other real property is taxed "in the same manner" and that taxation of real property "in the same manner" necessarily includes its classification for tax purposes as "real property". On substantially identical facts, the Oregon Supreme Court so held. *First National Bank of Portland v. Marion County,* 160 Ore. 595, 613-616, 130 Pac. (2d) 9, 16-17 (1942).

To the contrary, the California Supreme Court held that a tax on "real property" of a national bank should be sustained, even if similar property owned by others was generally classified and taxed as personal property, *provided* the other property, denominated administratively "personal property", was taxed in the same ~~manner~~ AMOUNT as national bank property discriminatorily classified as "real property".

Because of square conflict in decision between the California and Oregon Supreme Courts upon identical Constitutional question of importance to all national banks and since the decision below decided Federal questions of substance contrary to prior decisions of this Court, we believe that the granting of the petitions for *certiorari* in these cases would be in the public interest.

STATEMENT.

Pertinent facts in these cases are not in dispute and are fully set forth in the petitions for *certiorari* and grounds in support thereof filed in this Court by the respective petitioners.

Interest of the California Bankers Association.

Through its member banks, this Association is vitally concerned with three aspects of questions presented on the *certiorari* petitions:

1. The California Supreme Court held that conditions of Congressional consent to tax national bank "real property" under R.S. 5219 were met if such property be "real property" for tax purposes by state statutory definition and "equivalent" taxes were levied on similar property of others classified as "personal property". If the decision below were generally followed, in practice it would prevent any national bank from enforcing the Congressional prohibition against local taxation of its personal property. Most states levy taxes on personal property for general governmental purposes at the same rates and on the same percentage of value as "real property".

"Special assessment" taxes discussed by the Court below are seldom factually present. The California decision thus renders meaningless the prohibition in R.S. 5219 against state taxation of personal property of national banks.

2. Many national banks lease their premises. The California Supreme Court has confessedly approved discriminatory taxation of buildings owned by *bank* landlords under a situation in which the discriminatory treatment was occasioned *solely* because of occupancy by a *bank*. Discrimination in taxation of property occupied by banks, as distinguished from business premises occupied by others, has never before been approved by any Court, either as permissible under R. S. 5219 as to national banks or as tolerated by the Equal Protection clause of the Fourteenth Amendment for state and national banks. The adverse effect of the California decision on banks generally is apparent.

3. Banks, national and state, are on occasion subjected to state taxes believed by them to be invalid because of violation of Federal Statute or Constitution. It is usual banking practice to pay such allegedly void taxes under protest and rely upon existing state statutory procedure for recovery of so much thereof as may later be judicially found invalid. The decision in the *Security Bank Case* in conflict with the previous California established rule of thirty-nine years' standing applies retroactively a requirement of preliminary exhaustion of an administrative remedy which, until the decision below, had never before been regarded as applicable. It denies to the petitioner bank, wholly because of such failure to take intial administrative steps, an otherwise admitted right to recovery of taxes

levied in violation of both Federal Constitution and Statute.

Furthermore, the decision below asserts, contrary to prior decision by this Court, a duty upon the national bank petitioner to seek administrative relief *not* for the purpose of curing the Federal Constitutional defect in its *own taxes* but for the purpose of raising the taxes of all others similarly situated to the same level.

If the decision below were generally followed, it would necessarily nullify on many occasions vested rights of national banks to recover invalid state taxes which, as here, were confessedly in violation, in part at least, of Federal Constitution or Statute.

DISCUSSION.

1. EFFECT OF DECISIONS BELOW ON STATE TAXATION OF NATIONAL BANK PROPERTY.

The relation of national banks to the United States and to the purposes intended to be carried out by their creation are such that there can be no taxation of their property by or under state authority except in conformity with restrictions embodied in the consent given by Congress. *Des Moines National Bank v. Fairweather*, 263 U. S. 103, 106. Consent for local *ad valorem* taxation of national bank property is contained only in paragraph 3 of R. S. 5219. In clear language, no state thereunder can tax national bank *personal property*. Nevertheless, it has been necessary for this Court on several occasions specifically to deny to states their asserted right to tax such *personal*

property. Owensboro National Bank v. Owensboro, 173 U. S. 664, 667-9; *Rosenblatt v. Johnston,* 104 U. S. 462, 463. Relying thereon, the Court below has previously struck down attempts to tax national bank fixtures classified in accordance with the general administrative practice as "personal property". *People v. National Bank of D. O. Mills & Co.,* 123 Cal. 61; *First National Bank v. San Francisco,* 129 Cal. 96, 97.

It was formerly believed that *personal* property of a national bank withheld from state taxation constituted a constant form of property regardless of the state in which located. Looking to the true nature of the Congressional Act as not intended to interfere with local taxing institutions or customs, this Court has held that a state, for tax purposes, may define for itself what constitutes "real property" and such definition will authorize its taxation under the Federal Statute. *Reconstruction Finance Corp. v. Beaver County,* 328 U. S. 204, 210. However, this Court pointed out that such state tax definition must be in accordance with "settled" state rule and *not* effect "a *discrimination* against the government or patently run contrary to the terms of the Act."

Seizing upon the right of state tax definition, the California Supreme Court held that under current California statutory definition bank fixtures were "real property". In upholding taxes levied upon national bank fixtures solely because of such statutory definition, the California Court ignored the foundation of prior cases upon which this Court rendered its decision in the *Beaver County Case.* Thus the Court below squarely recognized that tax classification of fixtures, far from being "settled" in

California as "real property", were during the years in question "generally" classified as personal property. The California *administrative* practice in this respect was identical with that discussed in *First National Bank of Portland v. Marion County, supra,* and by reason of which the attempt in Oregon discriminatorily to tax national bank fixtures as "real property" was held void.

Unlike the Oregon Court, the California Court *excused* "deliberate" and "intentional" administrative tax discrimination in classification of national bank fixtures upon the doctrine of tax equivalency, i.e., that fixtures of others generally, but illegally, classified as "personal property" were nevertheless taxed in the same amount for general governmental purposes as they would have been had they been classified as "real property". In cases in which there is drawn into question the *power* of a state to levy a tax at all, this Court has long rejected the defense of tax equivalency. *Owensboro National Bank v. Owensboro,* 173 U. S. 664, 683; *First National Bank of Gulfport v. Adams,* 258 U. S. 326, 365. Compare on similar Constitutional question but different facts: *Freeman v. Hewit,* 329 U. S. 249, 254; *Fairbank v. United States,* 181 U. S. 283, 293.

If generally adopted, the decision of the Court below would always justify imposition of a tax upon national bank property irrespective of its classification when a state Court so desired. The true meaning of a state tax definition is properly a state question. The determination of the highest Court of the state as to such is binding upon this Court. Thus, although the state Court necessarily recognized factual discrimination in the classifica-

tion method, under the reasoning of the Court below if the amount of tax levied under the invalid classification were the same as under the proper classification, it could with impunity ignore the Congressional prohibition against state taxation of personal property of a national bank.

Moreover, in these cases, the violation of the Congressional Act becomes even more apparent upon complete consideration of the state tax system. California has attempted, by what it contends is valid compliance with paragraph 1(c) of R.S. 5219, to levy a tax upon national banks "according to or measured by the net income" thereof. As stated in the decision below (R. 134, 136)[1] the rate of tax so fixed on *bank* income (Section 4a, California Bank and Franchise Tax Act) is *higher* than that levied on income of non-banking corporation. The amount of the additional rate, as found by the Court below (R. 134, 136) is determined by the amount of local personal property taxes (in terms of non-banking net corporate income) paid by other corporations, but from which, because of the prohibition of R.S. 5219, national bank property is necessarily exempt.

To use, as California has done in these cases, the *statutory* classification of "*real property*" to support *local* taxation of national bank fixtures and then to employ the *administrative* general classification as "*personal property*" of the same type of fixtures in the hands of other corporations for the basis of levying an additional *state* tax on bank income is akin to, if not, double taxation

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[1]When record references are employed herein, they are to the record in Security-First National Bank, a national banking association, petitioner v. County of Los Angeles, et al., No. 362.

prohibited by the Fourteenth Amendment. *Hopkins v. Southern California Telephone Co.*, 225 U. S. 393, 403. It certainly constitutes the "discrimination" against Federal instrumentalities condemned by this Court in *Reconstruction Finance Corp. v. Beaver County, supra.*

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2. EFFECT OF DECISIONS BELOW ON NATIONAL BANK LANDLORDS AND NATIONAL BANKS LEASING PROPERTY FOR BANKING PURPOSES.

The decisions below frankly concede that *bank* landlords were compelled to pay taxes on fixtures installed by their lessees although all *other* landlords were free from taxes levied on similar fixtures installed by their non-banking tenants. The sole excuse suggested by the California Supreme Court is that bank landlords so discriminated against can by lease covenant transfer the discriminatory tax burden to their bank tenants. Elsewhere the decision found that neither the California Supreme Court nor the trial Court could determine, as to any building, the amount of additional tax placed thereon by reason of bank-owned fixtures (R. 137).

The Court below, therefore, assumed that an economic burden, not shared by other landlords, would in the first instance be placed upon bank landlords. Such economic burden ultimately, whether by lease covenant or through speculatively increased rents, will be transferred to the national bank tenants. Such burden would not, of course, exist had their landlords received the same treatment as other landlords and national bank fixtures had been classified, as in all other cases, as personal property. To pre-

vent exactly such discrimination against national banks is, of course, the purpose of R. S. 5219.

Moreover, such discrimination in treatment between bank and non-bank landlords was an obvious violation of the Equal Protection clause. *Hillsborough Township v. Cromwell,* 326 U. S. 620, 623; *Sioux City Bridge Co. v. Dakota County,* 260 U. S. 441, 445-7; *Iowa-Des Moines National Bank v. Bennett,* 234 U. S. 239, 245-6. Even if it be assumed, as indicated by the California Court, that the general practice in not taxing tenant-owned fixtures to other landlords was contrary to state statute, the right to equal treatment under the Due Process clause is paramount to compliance with the statute. *Hillsborough Township v. Cromwell, supra; Montana National Bank v. Yellowstone County,* 276 U. S. 499, 503-4.

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3. EFFECT OF DECISION IN THE SECURITY BANK CASE UPON VESTED RIGHTS OF TAXPAYERS TO RECOVER TAXES ADMITTEDLY IN VIOLATION OF FEDERAL CONSTITUTION AND STATUTE.

In the *Simms Case,* the Court below ordered judgment for petitioners for recovery of "*special assessment taxes*" because of "*discrimination*" in violation of both Federal Constitution and statute. Conceding that the same facts existed as to the taxes involved in the *Security Bank Case,* the bank petitioner therein was denied recovery solely because it had failed initially to appear before a board of equalization so that the board might correct all other assessments (although upon prior application it had already refused so to do) and remove the discrimination

which had occasioned the invalidity in assessment of petitioner's building. Such decision presents two violations of petitioner's rights under the Fourteenth Amendment:

1. In holding the right to equal treatment required by the Equal Protection clause might be *excused* because the wronged taxpayer had not taken administrative steps to remove the inequality by raising the taxes of all others to the same level, the determination below is squarely contrary to prior decisions of this Court. *Hillsborough Township v. Cromwell*, 326 U. S. 620, 623; *Iowa-Des Moines National Bank v. Bennett*, 234 U. S. 239, 245-6; *Sioux City Bridge Co. v. Dakota County*, 260 U. S. 441, 445-7.

2. The decision below that California law required initial administrative application to a board of equalization when a tax was assailed because of the alleged *exempt* character and part of the property, or for any reason other than overvaluation, reversed for the first time since 1911 the contrary rule first stated in *Brenner v. City of Los Angeles*, 160 Cal. 72, 76, 116 Pac. 397, 399. The decision applied the *new* rule *retroactively* to a situation occurring nine years earlier and under circumstances in which petitioner could not then comply. A state legislative act so attempting to destroy a vested procedural right of recovery of a tax upon Federal grounds would be void as a denial of the petitioner's right to due process of law. The same result follows when the state acts, not through its legislature, but by its Court of last resort. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U. S. 673, 679-80.

4. FEDERAL QUESTIONS PRESENTED.

It is not the purpose of this brief to discuss in detail legal issues involved. From the above it seems manifest that not only are substantial Federal questions presented, but such are properly justiciable in this Court. Although the decision in the *Security Bank Case* turned upon a procedural question, the California Supreme Court conceded that *if* the petitioners' claim therein properly involved a question of tax of "exempt" property no application would have been required to the county board of equalization even under its new-found administrative rule (R. 124). It reached the conclusion that no exemption was in fact involved because of its own construction of R. S. 5219 and the Fourteenth Amendment. The decision, although procedural in character, thus presents a basic Federal question, the determination of which is one ultimately for this Court. *Standard Oil Company of California v. Johnson,* 316 U.S. 481, 483; *Fischer v. Whiton,* 317 U.S. 217, 220.

CONCLUSION.

The public importance of issues in these cases to the entire national banking system is such that this Court should grant the petitions for *certiorari.* The decision of this Court in *Reconstruction Finance Corp. v. Beaver County, supra,* has been taken by the Court below from its framework of prior decision and utilized to reach conclusions contrary to all prior holdings as to the necessary relationship between state taxation and national bank "real property". If unreviewed herein, such de-

cision will create confusion not only in California but in other jurisdictions as well.

For the foregoing reasons, it is respectfully submitted that the petitions for writ of certiorari in the above cases should be granted.

Dated, San Francisco, California,
October 2, 1950.

WILLIAM L. HOLLOWAY,
C. COOLIDGE KREIS,
Amicus Curiae on Behalf of California Bankers Association.

FILED
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IN THE

SUPREME COURT

OF THE

United States

October Term, 1950

No. 361

W. J. SIMMS, WILLIAM S. ROSECRANS, EDWARD W. COST, CARRIE D. GRIBBLE, ZELLA Z. McCOMB, MERCHANTS NATIONAL REALTY CORP., a corporation, and SECURITY-FIRST NATIONAL BANK OF LOS ANGELES, a national banking association,

Petitioners,

vs.

COUNTY OF LOS ANGELES, a body corporate and politic, and CITIES OF GARDENA, VERNON, MONTEREY PARK, and CLAREMONT, municipal corporations,

Respondents.

No. 362

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES, a national banking association,

Petitioner,

vs.

COUNTY OF LOS ANGELES, a body corporate and politic, and CITY OF VERNON, a municipal corporation,

Respondents.

ANSWER TO BRIEF OF AMICUS CURIAE

HAROLD W. KENNEDY,
County Counsel,
A. Curtis Smith,
Assistant County Counsel,
Gordon Boller
Deputy County Counsel,
Arvo Van Alstyne
Deputy County Counsel,
County of Los Angeles,
Attorneys for Respondents.

OF COUNSEL:
Louis A. Babior,
Deputy City Attorney,
H. H. MacDonald,
Deputy City Attorney,
City of Los Angeles.

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COUNTY OF LOS ANGELES, a body corporate and politic, and CITY OF VERNON, a municipal corporation,

Respondents.

ANSWER TO BRIEF OF AMICUS CURIAE

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The California Bankers Association misconceives the issues and the applicable cases. Considering its erroneous views we can well understand its assertion that

it deems the question important and substantial. It will be the purpose of this brief to clarify the issues, thereby demonstrating that the Association's assertions are unfounded and that the opinion sought to be reviewed follows prior decisions of this Court, and that no substantial or important principles have been newly declared.*

It must be borne in mind that there is no separate bank fixture assessment involved in any of these cases. (R. 4, 90-91 in No. 361.) Each assessment of petitioners' properties was assessment of the entire building, which is real property and taxable. The power of the States to tax real property of national banks has always existed (*McCulloch v. Maryland, 4 Wheat.* (17 U. S.) 316 (at 436), and is expressly recognized and preserved by the third paragraph of R. S. 5219. The buildings of all others also were taxed and taxed as real property. The assessment description upon the roll opposite legal designation of the land appeared under the heading "improvements". (R. 58 in No. 361.) The assessment description of both the subject property and of all other buildings was the same. Had the subject buildings been valued as other buildings (i.e., exclusive of fixtures) no problem of discrimination and certainly no question of power to tax could possibly have existed. However, contrary to state law, the Assessor of Los

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*It is unnecessary to consider whether the questions are substantial or important if this Court agrees with the jurisdictional points urged in the principal briefs:

With respect to No. 361: The decisions are not final, further judicial proceedings having been ordered requiring the exercise of discretion and judgment.

With respect to No. 362: The Federal question was raised too late, admittedly having been raised for the first time in the petition for rehearing.

Angeles County, in arriving at the values of other buildings, excluded fixtures and assessed them separately as personal property. (R. 69-70 in No. 361.) This left all buildings properly on the tax assessment rolls and properly and uniformly described thereon as "improvements" but not properly equalized as to value.

This Court has consistently held that errors in value or rate of tax do not destroy the "power" to tax but that such errors go only to the amount of the tax which may be legally collected or retained. The uniformity and equal treatment required by the Equal Protection Clause relate to equality of tax burden. Only to the extent that the tax burden is excessive are the taxes refundable. In *Sioux City Bridge Co. v. Dakota County,* 260 U. S. 441 at 446, this Court said:

> ". . . This court holds that the right of the taxpayer whose property alone is taxed at 100 per cent of its true value is to have his assessment reduced to the percentage of that value at which others are taxed, even though this is a departure from the requirement of statute. The conclusion is based on the principle that where it is impossible to secure both the standards of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law."

In *Central State Bank v. Bennett,* 284 U. S. 239, at 247, this Court said:

> ". . . The right invoked is that to equal treatment; and such treatment will be attained if

> either their competitors' taxes are increased or their own reduced. . . ."

Hillsborough Township v. Cromwell, 326 U. S. 620, is but an extreme application of the same principle. There the other property escaped taxation altogether and so, in order to bring the subject property down to the same level, it was necessary to reduce the taxes on the subject property to zero.

The above three cases arose under the Equal Protection Clause. The same general rule has been applied to taxes levied under R. S. 5219. *Tradesmen's Natl. Bank v. Okla. Tax Comm.,* 309 U. S. 560; *Iowa Des Moines Nat. Bank v. Bennett,* 284 U. S. 239; *New York ex rel Amoskeag Sav. Bank v. Purdy,* 231 U. S. 373; *Stanley v. Board of Supervisors,* 121 U. S. 535; *Peo. Natl. Bank of Lynchburg v. Marye,* 191 U. S. 272.

In the last cited case the same contention was made as here that the irregularities and illegal method followed rendered the subject tax "void" and beyond the power of the taxing authorities. This Court rejected such contention, saying:

> "We are of opinion, however, that these assessments were not void within the meaning of the rule which absolves the taxpayer from the necessity of paying or tendering the amount equitably due from him. If there were no right to assess the particular thing at all, either because it is exempt from taxation, or because there is no law providing for the same, an assessment under such circumstances would be void, . . . Where, however,

there is a statute which provides for an assessment, and gives jurisdiction to the taxing officer, under some circumstances, to make one, but the particular assessment is invalid . . . the equitable duty still rests upon him to pay what would be his fair proportion of the tax as compared with that laid upon other property, . . . This is the equitable rule, and it is good morals as well. . . ." (191 U. S. at 281.)

The above quotation demonstrates that the reason for the rule is not peculiar to any particular paragraph of R. S. 5219 but is the same general rule applied in the first three cases decided under the Equal Protection Clause. Moreover, since the above cases apply the general rule to taxes under the first paragraph of R. S. 5219 which is a grant of power, *a fortiori* the general rule is applicable to cases under the third paragraph, which merely preserves a power that has always existed.

The foregoing eight cases are in sharp contrast with, and must be distinguished from, two other cases where the tax in question was wholly unauthorized. *Owensboro Natl. Bank v. Owensboro,* 173 U. S. 664; *First Natl. Bank of Gulfport v. Adams,* 258 U. S. 362.

In the latter situation the tax being unauthorized and void cannot be saved by any doctrine of "tax equivalency". In the former situation the subject tax, being authorized, is only reduced to the extent necessary to remove the discrimination and make the taxes equivalent to those of the most favored taxpayers.

The California Bankers Association cites as contrary to the decisions below the Oregon case of *First National Bank of Portland v. Marion County,* 169 Ore. 595, 130 Pac. (2d) 9, as invalidating "the attempt in Oregon discriminatorily to tax national bank fixtures as real property." Such representation is directly contrary to the Court's own statement that

> "We are not here passing upon the question of whether the plaintiff's trade fixtures and equipment are real property or personal property within the meaning of those terms as used in our tax law. Nor are we deciding whether or not such trade fixtures and equipment may be taxed to the owner of the legal estate as fixtures annexed to or improvements of real property." (169 Ore. at 615, 130 Pac. (2d) at 16).

Actually what that case held was that real property could not legally be taxed to a *tenant* under state statute (subject to certain statutory exceptions of which fixtures was not one).

There is thus no conflict in state court decisions.

The decisions of this Court have already fully and adequately prescribed the type and amount of relief which should be given and which was the relief given by the California Supreme Court. *Sioux City Bridge Co. v. Dakota County,* 260 U. S. 441; *Cent. State Bank v. Bennett,* 284 U. S. 239; *Hillsborough Township v. Cromwell,* 326 U. S. 620; *Tradesmen's Natl. Bank v. Okla. Tax Comm.,* 309 U. S. 560; *Iowa Des Moines National Bank v. Bennett,* 284 U. S. 239; *New York ex rel*

Amoskeag Sav. Bank v. Purdy, 231 U. S. 373; *Peo. Natl. Bank of Lynchburg v. Marye,* 191 U. S. 272; *Stanley v. Board of Supervisors,* 121 U. S. 535.

DISCUSSION OF SPECIFIC POINTS RAISED BY CALIFORNIA BANKERS ASSOCIATION

"1. *Effect of Decisions Below on State Taxation of National Bank Property.*" (Am. Cur. Br., p. 5.)

If the California Bankers Association is familiar with the history of bank vault door and fixture litigation in California, it must know that the discrimination complained of in Los Angeles County was corrected in 1947 and it was so held in a companion case to the present cases. (*Security First Natl. Bank v. Board of Supervisors,* 35 Advance Cal. Rep. 351, 354; 217 Pac. (2) 948, 951.) Petitioners do not seek a review of such decision.

Apparently the California Bankers Association has concerned itself with these cases because it fears that our State Supreme Court may hereafter encroach upon the exemptions of national bank property. It indicates distrust of the State Supreme Court when, after referring to *Reconstruction Finance Corporation v. Beaver County,* 328 U. S. 204 (1946), it states:

> "Seizing upon the right of state tax definition, the California Supreme Court held that under current California statutory definition bank fixtures were 'real property.' . . . " (Am. Cur. Br., p. 6.)
> "If generally adopted, the decision of the court

> below would always justify imposition of the tax upon national bank property irrespective of its classification when a state Court so decided." (Am. Cur. Br., p. 7.)

The statements are completely unfounded, and the record and history of bank fixture litigation in California so demonstrate. The California Bankers Association overlooks the fact that the first of the California bank cases holding vault doors and fixtures to be real property was decided in 1940, six years *before* the *Beaver County case.* (*San Diego Trust and Savings Bank v. San Diego County,* 16 Cal. (2d) 142, 105 Pac. (2) 94 (1940). Certiorari denied 312 U. S. 679.) Since then the decision has been consistently followed. (*Trabue-Pittman Corporation v. Los Angeles County,* 29 Cal. (2d) 385, 175 Pac. (2) 512 (1946); *Simms v. County of Los Angeles,* 35 Advance Cal. Rep. 332, 217 Pac. (2) 936 (1950). Moreover, it is but a declaration of what the law has always been in California since the codes were adopted in 1872. (Cal. Revenue & Taxation Code, secs. 104, 105 (1941); based on Cal. Political Code, sec. 3617 (enacted 1872)). While there are many cases holding that as between parties in a contractual relationship fixtures may be personal property (or at least that their correlative rights and obligations may be similar thereto) nevertheless where rights of third parties were involved, fixtures have been treated as real property so long as they remained annexed. *Dauch v. Ginsburg,* 214 Cal. 540, 6 Pac. (2) 952; *Oakland Bank of Savings v. Cal. P. B. Co.,* 183 Cal. 295, 191 Pac. 524; *McNally v. Connolly,* 70 Cal. 3, 11 Pac. 320;

Hammond Lumber Co. v. Gordon, 84 Cal. App. 701, 258 Pac. 612. Thus, the rule that fixtures are real property is a long established principle of California law.

The background thereof is the same as the Pennsylvania rule approved in *Reconstruction Finance Corp. v. Beaver County,* 328 U. S. 204 (1946). Precise application of the California rule was made to bank vault doors and bank fixtures, not only before the *Beaver County* case but before the levy of any of the taxes here in question. (*San Diego Trust and Savings Bank v. San Diego,* 16 Cal. (2d) 142 (1940), 105 Pac. (2d) 94, Certiorari denied 312 U. S. 679.) Thus, no charge may be made that our California Supreme Court has given its approval to any subterfuge. On the contrary, it has applied the state law and, to the extent that the local taxing officials in this county failed to follow the state law with respect to other property, it has ordered that petitioners be given the same favorable treatment. The decision of the Court below should not cause but should dissipate any fear of the California Bankers Association that it "would always justify imposition of a tax upon national bank property . . . when a state court so desired." If such a case should arise this Court should review it. But unless the California Supreme Court became insensitive to the United States Constitution and laws there would be no occasion for Federal intervention. (*Parker v. County of Los Angeles,* 338 U. S. 327, at 332.)

"3. *Effect of Decision in the Security Bank Case Upon Vested Rights of Taxpayers to Recover Taxes Admittedly in Violation of Federal Constitution and Statute.*" (Am. Cur. Br., p. 10.)

Under the above heading the California Bankers Association completely misconstrues California law in two respects, and it is only because of such misconstruction that a federal question is even suggested.

First: Neither California statutes nor decisions require that the wronged taxpayer take administrative steps to have the taxes of others increased. The statute expressly provides for an application for reduction of petitioner's own property assessment. (Sec. 1607 Cal. Revenue and Taxation Code.) The County Board of Equalization may, independently or as an alternative, remedy the discrimination by increasing the taxes of others (Secs. 1605 and 1611, Cal. Revenue and Taxation Code), but nowhere in the law is the applicant authorized to seek or demand such relief. If the Board of Equalization fails to act so as to correct the applicant's assessments in one way or the other, the court will order it to act as was done herein in the Simms and companion cases (No. 361) now before this court. (R. 330 in No. 361; R. 140 in No. 362.) It will be noted that such order is not to increase the taxes of others but to directly and immediately give to petitioners the benefit of the most favorable tax treatment given to others.

Thus, the cases cited by the California Bankers Association, *Hillsborough Township v. Cromwell,* 326 U. S. 620, 623; *Iowa-Des Moines National Bank v. Bennett,* 284 U. S. 239, 245-6; *Sioux City Bridge Co. v. Dakota County,* 260 U. S. 441, 445-447, are not at all in point but provide as a contrast the law in New Jersey, Iowa and Nebraska, where the State rule limited the wronged taxpayer solely to the remedy of seeking an increase in taxes or full payment of taxes by the others who had been favored. This court, in striking down such rules held that the Federal requirements would be satisfied by reducing the taxes on the subject property to the level of the most favored taxpayers, thus producing equal treatment. That is exactly what the California Supreme Court has done herein. (R. 330 in No. 361; R. 140 in No. 362.)

Second: The rule requiring the exhaustion of administrative remedies is long established law in California, as applied to the situation of asserted overassessment or disproportionate assessment of property and the right to remedy therefor with the County Board of Equalization. The rule was so applied in *Fall v. Marysville,* 19 Cal. 391 (1861), and see *San Jose v. January,* 57 Cal. 614 (1881). Forty years later it was applied in *Henne v. County of Los Angeles,* 129 Cal. 297, 61 Pac. 1081 (1900). There is an exception to the rule, declared in *Brenner v. County of Los Angeles,* 160 Cal. 72, 116 Pac. 397 (1911), to wit, that the rule is not applicable to property not subject to taxation at all. This exception counsel miscall the rule

itself. There should have been no doubt regarding the scope of the exception, because twenty-four years ago the California Supreme Court reviewed both the rule and the exception and stated in *Luce v. San Diego,* 198 Cal. 405, at 406, 245 Pac. 196 (1926) that the exception applies only to "an attempted assessment of nontaxable property" and that the general rule applies "to an unequal assessment of taxable property." The *Luce* case was a discrimination case and was decided the same as the present case on the present issue. The rule requiring exhaustion of administrative remedies as so established has been consistently declared and applied during the thirty-nine years since the decision in *Brenner v. City of Los Angeles,* and during the twenty-four years since the *Luce* case. (*Los Angeles Gas & Elec. Corp. v. County of Los Angeles,* 162 Cal. 164, 121 Pac. 384; *Luce v. City of San Diego,* 198 Cal. 405; 245 Pac. 196; *Dawson v. County of Los Angeles,* 15 Cal. (2) 77, 98 Pac. (2) 495; *Universal Consol. Oil Co. v. Byram,* 25 Cal. (2) 353, 153 Pac. (2) 746; *McClelland v. Board of Supervisors,* 30 Cal. (2) 124, 180 Pac. (2) 676.)

Moreover, the purported Federal question was raised too late having been raised for the first time on petition for rehearing. This is not a "surprise" case within the meaning of *Brinkerhoff Faris Co. v. Hill,* 281 U. S. 673. In view of the long established State rule, petitioner should have anticipated that the Court might make current application thereof.

In addition petitioner's claim of "surprise" is squarely refuted by the record, wherein the following facts demonstrate that applicability of the rule of exhaustion of remedies was in fact anticipated by petitioner:

a) In 1941, counsel for petitioner bank presented other Board applications filed by its landlords with respect to similarly overvalued buildings other than the subject building. (R. 272-275 in No. 361.)

b) Petitioner filed Board applications in companion cases for years 1942-1946. (R. 276-313 in No. 361.)

c) The rule of the California cases requiring application was argued in the trial court. (R. 75-104 in No. 362.)

d) The same rule was argued in the Supreme Court of California. (Appellants' Opening Brief in California Supreme Court, pp. 33-43.)*

Petitioner's failure to urge denial of due process prior to the petition for rehearing precludes review by this Court. *Herndon v. Georgia,* 295 U. S. 441, 443-444; *American Surety Co. v. Baldwin,* 287 U. S. 156, 162.

*Copies of this brief are on file with the Clerk of this Court.

SUMMARY

The California Bankers Association in concluding its brief asserts purported abuse by the State Supreme Court of the decision in *Reconstruction Finance Corp. v. Beaver County,* 328 U. S. 204. Such charge, as we have seen, is utterly unfounded. The said rule has existed in California since adoption of the Codes in 1872 and was applied to bank fixtures six years prior to the *Beaver County* case and prior to all of the assessments here in dispute. (*San Diego Tr. & Sav. Bank v. County of San Diego,* 16 Cal. (2) 142, 105 Pac. (2d) 94 (1940). Certiorari denied 312 U. S. 679.)

The California Supreme Court, in entire good faith, has recognized the overriding constitutional requirement and has ordered in No. 361 a reduction in petitioners' taxes for the years 1941 to 1946 even though such taxes fully conformed to the law of California.

There is no further substantial or important question to be decided. The Assessor has himself corrected in subsequent years the discrimination occurring between 1941 and 1946. The local problem has been solved finally and completely and should not be reopened.

CONCLUSION

WHEREFORE, it is submitted that the Writs of Certiorari prayed for should be denied.

Respectfully submitted,

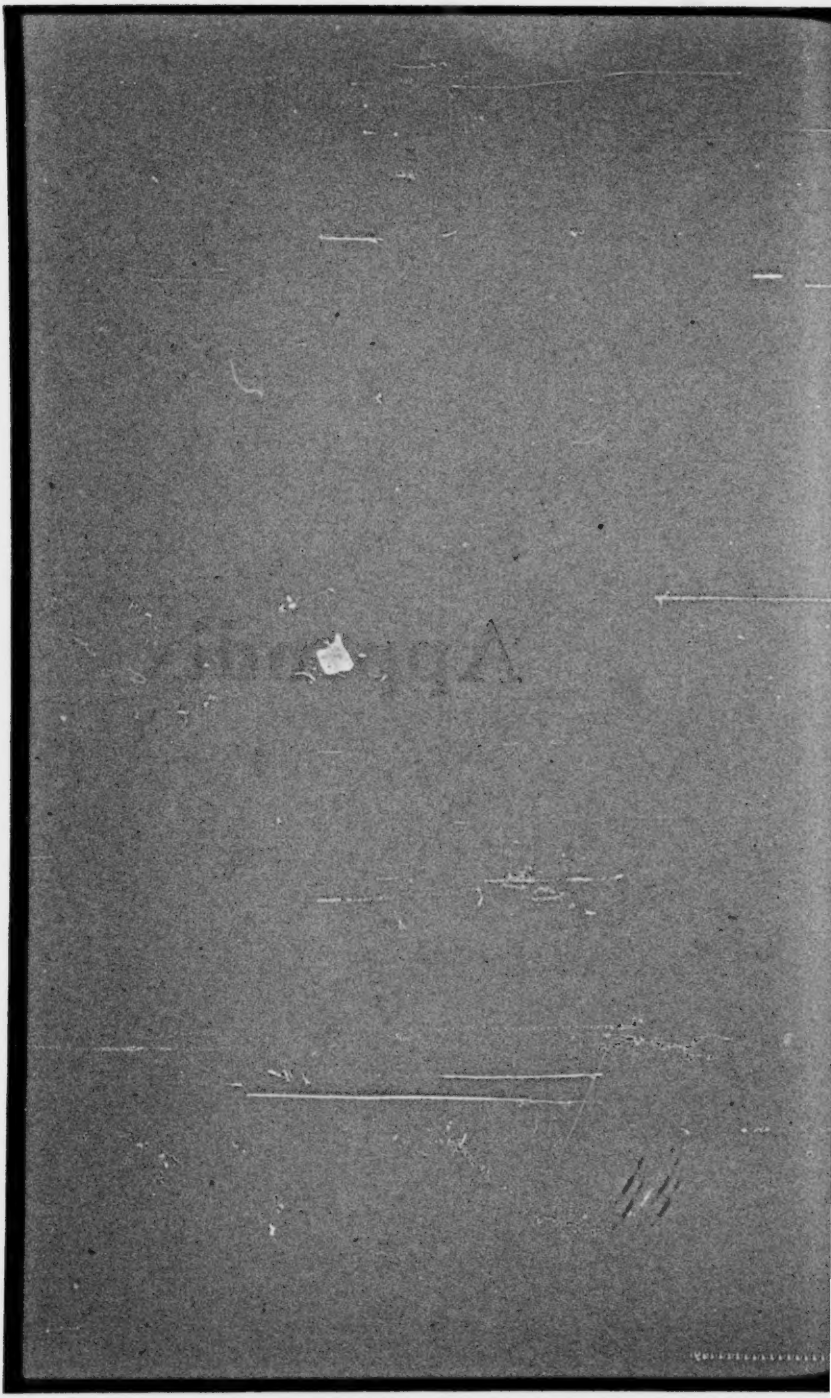
HAROLD W. KENNEDY, County Counsel,
A. Curtis Smith, Assistant County Counsel,
Gordon Boller, Deputy County Counsel,
Arvo Van Alstyne, Deputy County Counsel,
County of Los Angeles
Attorneys for Respondents.

Of Counsel:

Louis A. Babior, Deputy City Attorney,

H. H. MacDonald, Deputy City Attorney,
City of Los Angeles.

Appendix



APPENDIX

1. Excerpt from R. S. 5219

Paragraph 3 of the above statute reads, as follows:

> 3. Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed.

2. Excerpts from California Revenue and Taxation Code

Section 104: "Real estate" or "real property" includes:

(a) The possession of, claim to, ownership of, or right to the possession of land.

(b) All mines, minerals, and quarries in the land, all standing timber whether or not belonging to the owner of the land, and all rights and privileges appertaining thereto.

(c) Improvements.

Section 105: "Improvements" includes:

(a) All buildings, structures, fixtures, and fences erected on or affixed to the land, except telephone and telegraph lines.

(b) All fruit, nut bearing, or ornamental trees and vines, not of natural growth, and not exempt from taxation, except date palms under eight years of age.

(The foregoing sections are derived from former section 3617 of the California Political Code, enacted 1872, reading as follows:

Whenever the terms mentioned in this section are employed in this Title, they are employed in the senses hereafter affixed to them.

First—The term "real estate," includes:

1. The ownership of, claim to, possessions of, or right to the possession of land;

2. All mines, minerals, and quarries in and under the land, and all rights and privileges appertaining thereto:

3. Improvements.

Second—The term "improvements" includes:

1. All buildings, structures, fixtures, fences, and improvements erected upon or affixed to the land;

2. All fruit, nut bearing, or ornamental trees and vines not of natural growth.

Third—The term "personal property" includes everything which is the subject of ownership not included within the meaning of the term "real estate."

Fourth—The term "full cash value" means the amount at which the property would be appraised if taken in payment of a just debt due from a solvent debtor.)

Section 1605: After giving notice as prescribed by its rules, the county board may increase or lower any assessment on the local roll, in order to equalize the assessment of property on the local roll.

Section 1607: A reduction in an assessment on the local roll shall not be made unless the party affected

or his agent makes and files with the county board a verified, written application for it, showing the facts claimed to require the reduction.

(The foregoing section was derived from the former Section 3674 of the California Political Code, enacted 1872, reading as follows:

No reduction must be made in the valuation of property, unless the party affected thereby or his agent makes and files with the Board a written application therefor, verified by his oath showing the facts upon which it is claimed such reduction should be made.)

Section 1611: After five days succeeding the time when notice of the date when the matter will be investigated is sent by the clerk of the county board to all persons interested, the county board may direct the assessor to:

(a) Assess any taxable property other than State assessed property that has escaped assessment.

(b) Change the amount, number, quantity, or description of property on the local roll.

(c) Make and enter new assessments, at the same time canceling previous entries, when any assessment made by him is deemed by the county board so incomplete as to render doubtful the collection of the tax.

Section 2188: Every tax on improvements is a lien on the taxable land on which they are located, whether they are assessed to the landowner or to some other person.

Section 2188.2: Whenever improvements are owned by a person other than the owner of the land on which they are located, the owner of the improvments or the owner of the land may file with the assessor a written statement before the lien date attesting to their separate ownership, in which event the land and improvements shall not be assessed to the same assessee.

Section 3003: Where delinquent taxes or assessments are not a lien on real property sufficient, in the judgment of the assessor or the board of supervisors, to secure the payment of the taxes or assessments, the county may sue in its own name for the recovery of the delinquent taxes or assessments, with penalties and costs.

3. Excerpts from Bank and Corporation Franchise Tax Act of California.

Sec. 4a. The rate of tax on national banking associations and other banks and financial corporations mentioned in Sections 1, 2, and 4 of this act, shall be a percentage equal to the percentage of the total amount of net income, allocable to this State, of every corporation taxable under subdivision (3) of Section 4 of this act, other than public utilities as defined in the Public Utilites Act, for the next preceding calendar year or fiscal years ended during such calendar year, required to be paid to this State as franchise taxes according to or measured by such net income, and required to be paid to this State or its political subdivisions by such corporations as personal property taxes during the

preceding calendar year or fiscal years ended in such calendar year; provided, however, that said rate of tax shall not exceed 8 percentum. The percentage of the net income of every corporation taxable under subdivision (3) of Section 4 of this act, other than public utilities as defined in the Public Utilities Act, required to be paid to this State or its political subdivisions in personal property taxes shall be determined by ascertaining the ratio which the total amount of such personal property taxes, less 4 percentum thereof, bears to the total amount of net income of such corporation, allocable to California, increased by the amount of such personal property taxes; provided, however, that if any such corporation sustains a net loss allocable to California the personal property taxes required to be paid by such corporation to this State or its political subdivisions during the preceding calendar year or fiscal years ended during such calendar year shall be considered for the purpose of determining such ratio only to the extent which such personal property taxes exceed such net loss allocable to California.

The commissioner, after public hearing and opportunity given to examine the data on which his determination is based, shall determine not later than the thirty-first day of December of each year the average percentage of net income above specified, and, within thirty days after his determination, shall mail notice of his determination and the amount of tax payable on the basis of such determination to all banks and financial corporations affected thereby, which are then

classified on his records as banks or financial corporations, but such determination shall not be considered a deficiency assessment within the meaning of Section 25 hereof. The data gathered by the commissioner in determining the rate, referred to herein, shall be made available to the taxpayers affected by such determination at the time and in the manner prescribed by regulations adopted by the commissioner.

If it be judicially determined that the rate of tax on any bank or corporation is higher than is authorized by law such bank or corporation shall be relieved of liability for any tax imposed by this act only to the extent of the excess beyond that legally authorized. (Statutes of 1933, p. 871, as amended.)

Sec. 27. (a) If, in the opinion of the commissioner, or the State Board of Equalization, as the case may be, there has been an overpayment of tax, penalty or interest by a taxpayer for any year for any reason, the amount of such overpayment shall be credited against any taxes then due from the taxpayer under this act, and the balance shall be refunded to the taxpayer or its successor through reorganization, merger, or consolidation, or to stockholders upon dissolution. No such credit or refund shall be allowed or made until approved by the State Board of Control. No such credit or refund shall be allowed or made after four years from the last day prescribed for filing the return or after one year from the date of the overpayment, whichever period expires the later, unless before the expiration of such period a claim therefor is filed

by the taxpayer, or unless before the expiration of such period the commissioner has certified the overpayment to the State Board of Control for approval of the refunding or the crediting thereof. If (a), the taxpayer has, within the period prescribed in the preceding sentence, agreed in writing, under the provisions of Section 25, to extend the time within which the commissioner may propose an additional assessment, or (b) if the taxpayer has agreed with the United States Commissioner of Internal Revenue for an extension (or renewals thereof) of the period of proposing and assessing deficiencies in federal income tax for any year, the period within which a claim for credit or refund may be filed, or credit or refund allowed or made if no claim is filed, shall be the period within which the commissioner may make an assessment under such circumstances, except that the provisions of the preceding sentence shall apply to any claim filed, or credit or refund allowed or made, before the execution of such agreements. Insofar as the claim for credit or refund relates to an overpayment on account of the deductibility under Section 8 (e) of a debt as one which became worthless, or an erroneous inclusion of an amount attributable to the recovery of a bad debt, prior tax or delinquency amount under Section 6 (b) (4), due to an adjustment of a bad debt deduction under Section 8 (e), in lieu of the period of limitation prescribed in the second preceding sentence, the period shall be seven years from the date prescribed by law for filing the return for the year with respect to which the claim is made. A refund claim upon which action has become

final shall not thereafter be considered a refund claim within the meaning of the foregoing provision except to the extent allowed. Every claim for refund must state the specific grounds upon which the claim is founded.

(b) If the commissioner disallows any claim for refund, he shall notify the taxpayer accordingly. At the expiration of 90 days from the mailing of such notice, the commissioner's action upon the claim shall be final unless within such 90-day period, the taxpayer appeals in writing from the action of the commissioner to the State Board of Equalization. If the commissioner fails to mail notice of action on any refund claim within six months after the claim was filed, the taxpayer may, prior to mailing of notice of action on the refund claim, consider the claim disallowed and appeal to said board. Appeals must be addressed and mailed to the State Board of Equalization at Sacramento, and a copy of the appeal addressed and mailed at the same time to the commissioner at Sacramento. Said board shall hear and determine the same and thereafter shall forthwith notify the taxpayer and the commissioner of its determination. Such determination shall be final upon the expiration of 30 days from the time of such determination unless within such 30-day period the taxpayer or the commissioner files a petition for rehearing with said board, in which event the board's determination shall not become final until the expiration of 30 days from the time the board issues its opinion on said petition.

(c) (1) Interest shall be allowed and paid upon any overpayment in respect of any tax at the rate of 6 percentum per annum as follows:

(A) In the case of a credit, from the date of the overpayment to the date of the allowance of the credit. Any interest allowed on any credit shall first be credited on any taxes due from the taxpayer under this act.

(B) In the case of a refund, from the date of the overpayment to a date preceding the date of the refund warrant by not more than 30 days, such date to be determined by the commissioner.

(2) (A) If the commissioner disallows interest on any claim for refund, he shall notify the taxpayer accordingly. At the expiration of 90 days from the mailing of such notice, the commissioner's action upon the disallowance of such interest shall be final unless within such 90-day period, the taxpayer appeals in writing from the action of the commissioner to the State Board of Equalization. Appeals must be addressed and mailed to the State Board of Equalization at Sacramento, and a copy of the appeal addressed and mailed at the same time to the commissioner at Sacramento. Said board shall hear and determine the same and thereafter shall forthwith notify the taxpayer and the commissioner of its determination. Such determination shall be final upon the expiration of 30 days from the time of such determination unless within such 30-day period the taxpayer or the commissioner files a petition for rehearing with said board, in which event

the board's determination shall not become final until the expiration of 30 days from the time the board issues its opinion on said petition.

(B) Within 90 days after the mailing of the notice of the commissioner's action disallowing interest upon any refund claim, or in the case of an appeal to the State Board of Equalization from the disallowance of interest on any refund claim, within 90 days after the mailing of the notice of the board's determination of the appeal, the taxpayer may bring an action against the commissioner on the grounds set forth for interest in such claim for the recovery of the interest.

If the commissioner fails to mail notice of action of disallowance of interest on any refund claim within six months after the interest was claimed, the taxpayer may, prior to mailing of notice of action of disallowance of interest on the refund claim, consider the interest disallowed and bring an action against the commissioner on the grounds set forth for interest in such claim for the recovery of the interest.

(3) A payment not made incident to a bonafide and orderly discharge of an actual liability or one reasonably assumed to be imposed by law, is not an overpayment for the purposes of this subsection and interest is not payable thereon.

(4) If a credit or refund of any part of an overpayment would be barred under Section 27 (a), except for the seven-year limitation therein relating to bad debts, no interest shall be allowed or paid with respect to such part of the overpayment for any period begin-

ning after the expiration of the period of limitation provided in Section 27 (a), other than the seven-year limitation therein relating to bad debts, for filing claim for credit or refund of such part of the overpayment and ending at the expiration of six months after the date on which the claim was filed or, in case no claim was filed and the overpayment was found by the board, ending at the time the appeal was filed with the board.

(d) Any refund or any portion thereof which is erroneously made, and any credit or any portion thereof which is erroneously allowed, may be recovered, together with interest at the rate of 6 percentum per annum from the date the refund was made or the credit allowed, in an action brought by the commissioner in a court of competent jurisdiction in the County of Sacramento in the name of the people of the State of California, and such actions shall be tried in the County of Sacramento, unless the court, with the consent of the Attorney General or the counsel for the commissioner, orders a change in place of trial. The Attorney General or the counsel for the commissioner must prosecute such action, and the provisions of the Code of Civil Procedure, relating to service of summons, pleadings, proofs, trials, and appeals are applicable to the proceedings herein provided for.

In the event that a tax has been illegally levied against a taxpayer, the commissioner shall set forth on his records the reasons therefor and thereafter shall authorize the cancellation of such tax.

(e) If, after filing a protest or an appeal to the State Board of Equalization, pursuant to Section 25, a taxpayer pays the tax protested, before the commissioner acts upon the protest or the board on the appeal, the commissioner or the board shall treat the protest or the appeal as a claim for refund or an appeal from the denial of a claim for refund filed under this section. (Statutes 1929, p. 31, as amended.)

Sec. 30. (a) No injunction or writ or mandate or other legal or equitable process shall issue in any suit, action or proceeding in any court against this State or against any officer thereof to prevent or enjoin the assessment or collection of any tax under this act but any taxpayer claiming that the tax computed and levied against it pursuant to Section 24.1 and 25 of this act is void in whole or in part may bring an action against the commissioner for the recovery of the whole or any part of the amount paid. Such action must be filed within four years from the last date prescribed for filing the return or within one year from the date the tax was paid, whichever period expires the later; provided, that no action shall be filed for the recovery of a deficiency assessment unless the taxpayer has made protest to the commissioner of the computation and levy complained of under the provisions of Section 25 hereof or unless the taxpayer has filed a claim for refund for the tax in question, under the provisions of Section 27.

(b) Within 90 days after the mailing of the notice of the commissioner's action upon any refund claim,

or in case of an appeal to the State Board of Equalization from the disallowance of any refund claim, within 90 days after the mailing of the notice of the board's determination of the appeal, the taxpayer may bring an action against the commissioner on the grounds set forth in such claim for the recovery of the whole or any part of the amount claimed as an overpayment.

If the commissioner fails to mail notice of action on any refund claim within six months after the claim was filed, the taxpayer may, prior to mailing of notice of action on the refund claim, consider the claim disallowed and bring an action against the commissioner on the grounds set forth in such claim for the recovery of the whole or any part of the amount claimed as an overpayment.

(c) Whenever under the provisions of this section an action is commenced against the commissioner, a copy of the complaint and the summons must be served upon the commissioner or assistant commissioner. A second copy of the complaint and summons must be furnished to the commissioner, but this requirement shall not be considered jurisdictional. At the time the commissioner demurs or answers, he may demand that the action be tried in the Superior Court of the County of Sacramento, which demand must be granted. The Attorney General or the counsel for the commissioner must defend the action. The provisions of the Code of Civil Procedure, relating to pleadings,

proofs, trials, and appeals are applicable to the proceedings herein provided for. A failure to begin such action within the time herein specified shall be a bar against the recovery of such taxes. In any such action the courts shall have power to render judgment for plaintiff for any part or portion of the tax, interest, penalties or cost found to be void and so paid by plaintiff upon such assessment.

(d) In all actions now pending against the State Treasurer under the provisions of this act, the commissioner shall be substituted for the State Treasurer by the court wherein the action is pending. This substitution shall not in any way affect the rights of the plaintiff in said action.

(e) If judgment is rendered against the commissioner, amount thereof shall first be credited against any taxes and interest due from the taxpayer under this act and the remainder refunded to the taxpayer or its successor by the State Treasurer on warrant drawn by the Controller.

(f) In any judgment of any court rendered for any overpayment in respect of any tax imposed by this act, interest shall be allowed at the rate of 6 per centum per annum upon the amount of the overpayment, from the date of the payment or collection thereof to the date of allowance of credit on account of such judgment or to a date preceding the date of the refund warrant by not more than 30 days, such date to be determined by the commissioner. (Statutes of 1929, p. 31, as amended.)

No. [redacted]

[redacted]

[redacted]

Petitioners,

v.

[redacted]

Respondents.

[redacted]

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

[redacted]

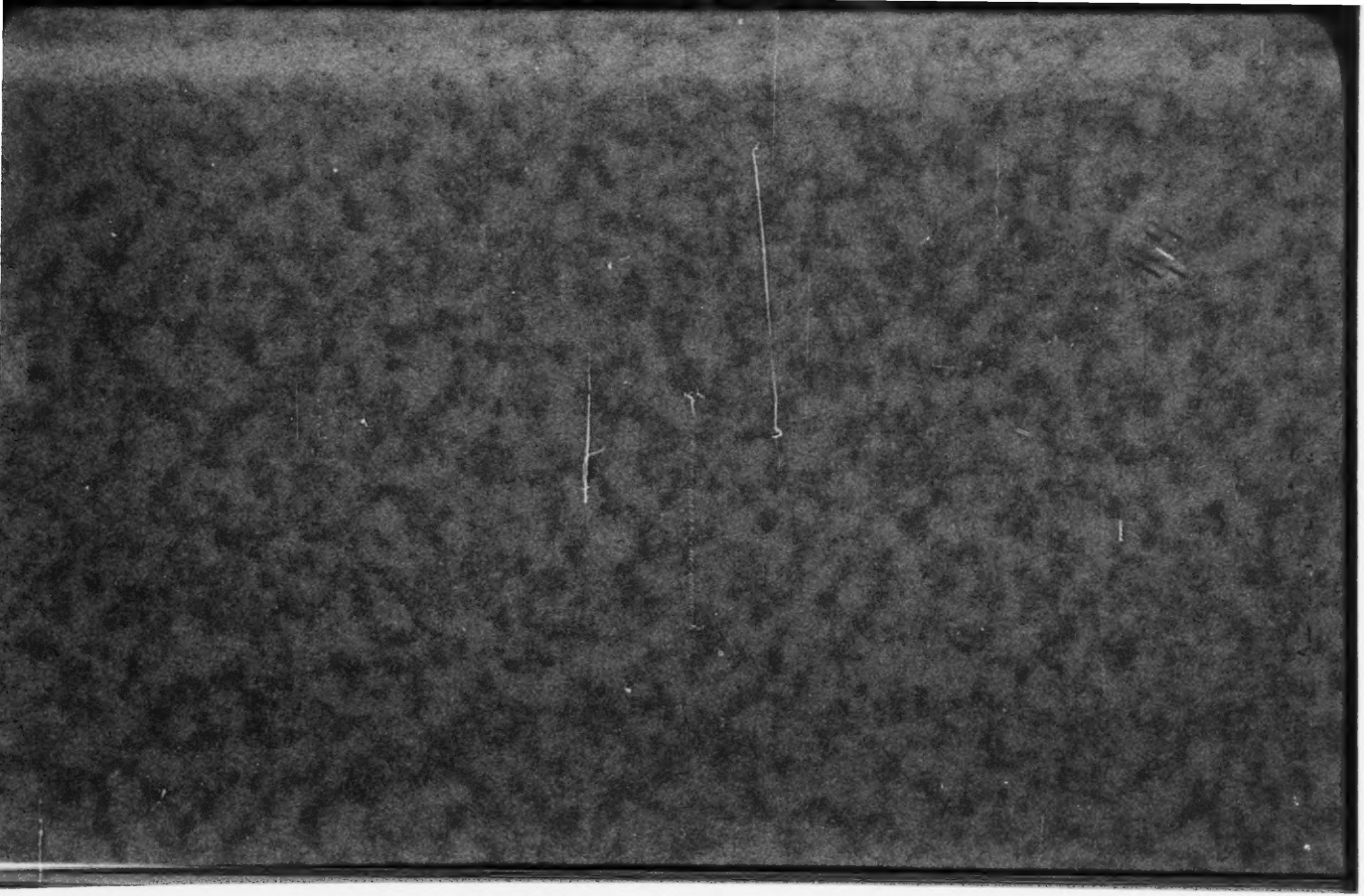
[redacted]
940 Edwards Building, Los Angeles 13,

[redacted]
910 Oviatt Building, Los Angeles 14,

Counsel for Petitioners.

[redacted]

Ritter & Campbell, Law Printers, Los Angeles. Phone MA. 6-3971



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In the Supreme Court of the United States

October Term, 1950.
No. 361

W. J. SIMMS, WILLIAM S. ROSECRANS, EDWARD W. COST, CARRIE D. GRIBBLE, ZELLA Z. MCCOMB, MERCHANTS NATIONAL REALTY CORP., a corporation, and SECURITY-FIRST NATIONAL BANK OF LOS ANGELES, a national banking association,

Petitioners,

vs.

COUNTY OF LOS ANGELES, a body corporate and politic, and CITIES OF GARDENA, VERNON, MONTEREY PARK, and CLAREMONT, municipal corporations,

Respondents.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

Petitioners pray that this Court grant rehearing of its Order of November 27, 1950, denying the petition for writ of certiorari, 340 U. S. ....., and that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California in the above entitled case, as prayed for in the petition filed October 14, 1950, herein.

Reasons for Granting Rehearing and Issuing the Writ.

1. Facts not previously presented, and in important part occurring after denial of the writ, greatly increase *continuing* importance of federal questions sought to be reviewed herein. Not only has discrimination against national banks, similar in character to that sought to be reviewed, continued in certain California counties to and including the current tax year but, we are informed by

counsel for Reconstruction Finance Corporation, that they are currently suffering from similar discriminatory practices in California and that litigation is now pending in Texas involving attempt there to tax pipe lines owned by RFC as real property while similar pipe lines privately owned are classified as personal property.

Discriminatory state tax classification of machinery, pipe lines and possessory interests, suffered by RFC, were temporarily prevented for the period June 30, 1947, to May 25, 1948, by Congressional prohibition (61 Stats. 205), prohibiting their taxation even if classifiable as real property under state law. But after May 25, 1948, the present provision of 15 U. S. C. 607 (62 Stats. 265), as prior to June 30, 1947, permits state taxation of such articles when owned by RFC, if classified as "real property" under state rule, when applied without discrimination. (*Reconstruction Finance Corporation v. Beaver County,* 328 U. S. 204, 206-208.)

As was the case with petitioners herein, the impact of state discrimination in tax classification upon the Congressional grant of power of the state to tax properties of governmental agencies, typified by RFC, finds its largest impact in claimed right to assess machinery, equipment and trade fixtures. The extreme point of such discrimination against RFC by respondent county, mentioned in the Solicitor General's memorandum, occurred during World War II and arose out of temporary installation in private defense plants of machinery and equipment owned by RFC or its subsidiary, loaned or leased for carrying on of the War effort. Discriminatory classification of such machinery as improvements, solely to avoid the governmental agency tax exemption of personal property, when as found herein, similar privately owned machinery in the same defense plants was classified as personal prop-

erty, greatly increased administrative difficulties of the World War II effort and greatly increased the cost of such effort. We are informed that in the aggregate local tax discrimination of similar character increased the cost of such effort throughout the United States by several hundreds of millions of dollars.

Since November 25, 1950, the international situation has developed into a state of undeclared war with Communist China. Without question, the present crisis will, as in World War II, again require loan or lease by governmental agencies of machinery and equipment for installation in private defense plants. Unless the rights of governmental agencies and local entities in the tax field, as to such machinery, equipment and trade fixtures, are now determined for the guidance of all, there will be a repetition in the present crisis of the same governmental administrative difficulties and increased cost.

2. By telegraphic reply (filed November 24, 1950) to the Solicitor General's memorandum on behalf of the United States in support of the petition, respondents urged that no federal question is presented as to the "power" of a state to tax national bank real property. They assert that the judgment below is supported by the *inherent* right of each state to subject to local taxation *all real* property of federal instrumentalities and agencies located within its boundaries. They claim that R. S. 5219, in restricting such taxation "to the same extent, according to its value, as other real property is taxed" is only a "saving clause." For support they rely solely upon a *dictum* in *McCullough v. Maryland*, 4 Wheat. (17 U. S. 316) 436.

The doctrine that a state has *inherent* taxing power over all Government-owned real property within its boundaries was rejected in *Van Brocklin v. Tennessee*, 117 U. S. 151, 156-173; as to real property of national banks, in *National*

Bank of Guthrie Center v. Anderson, 269 U. S. 341, 347, and as to federal agencies, in *Reconstruction Finance Commission v. Beaver County,* 328 U. S. 204, 209. Even where, without question, the property sought to be taxed or assessed by the state is "real property", it may not be taxed except in accordance with the terms of the Congressional consent. Such "grant should clearly and unequivocally confer the privilege" to the state to tax such real property of the public agency in the manner made. *Board of Directors v. Reconstruction Finance Commission,* 170 F. 2d 430, 433 (8 C. C. A., 1948).

The judgment below represents an attempt by California to tax real property of petitioners without regard to the terms of the Congressional grant. Permitting such judgment to remain in force not only denies to petitioners enforcement of federal rights under R. S. 5219; it creates a precedent which will endanger subsequent governmental activities and is in conflict with the rule of the Eighth Circuit, not previously called to the attention of this Court, cited above.

3. Respondents strenuously urged in their brief (pp. 2-6) that the state judgment sought to be reviewed was not *final* and therefore application for certiorari was premature. *Federal* questions involved herein are of such importance both to petitioners and the Government that, unless they are to be reviewed by this Court now, they should be reviewed *subsequently* if prematurely raised at this time.

If in fact certiorari is premature at this time, such federal questions ultimately can be reviewed by this Court upon the same factual record upon conclusion of final proceedings in the trial court, followed by second decision of the California Supreme Court. *Urie v. Thompson,* 337 U. S. 163, 171. It is therefore respectfully urged,

even in the event of the denial of this petition for rehearing, that this Court should state its reasons for its denial, so that petitioners and the Government may be properly advised.

CONCLUSION.

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Supreme Court of the State of California.

Respectfully submitted,

W. SUMNER HOLBROOK, JR.,
EDMUND NELSON,
Counsel for Petitioners.

Certificate of Counsel.

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 33 of rules of this Court.

W. SUMNER HOLBROOK, JR.,
EDMUND NELSON,
Counsel for Petitioners.

DEC 11 1950

October Term, 1950

No. 352

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES, a National Banking Association,

Petitioner,

vs.

COUNTY OF LOS ANGELES, a body corporate and politic; and CITY OF LONG BEACH, a municipal corporation,

Respondents.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

W. SUMNER HOLBROOK, JR.,
740 Rowan Building, Los Angeles 13,
EDMUND NELSON,
912 Oviatt Building, Los Angeles 14,
Counsel for Petitioner.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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In the Supreme Court of the United States

October Term, 1950
No. 362

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES, a national banking association,

Petitioner,

vs.

COUNTY OF LOS ANGELES, a body corporate and politic; and CITY OF VERNON, a municipal corporation,

Respondents.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

Petitioner prays that this Court grant rehearing of its Order of November 27, 1950, denying the petition for writ of certiorari, 340 U. S. ....., and that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California in the above entitled case, as prayed for in the petition filed October 14, 1950, herein.

Reasons for Granting Rehearing and Issuing the Writ.

1. When petition for certiorari was filed herein on October 14, 1950, the judgment below had not been subsequently construed. Since that time, the California court has construed its judgment herein and in so doing clearly demonstrated that its judgment not only violates petitioner's rights to due process but that it presents substantial federal questions which could not previously have been presented to this Court.

Respondents represented to this Court that the judgment below, in barring petitioner's recovery, solely because

of failure to appear before a board of equalization, had applied a long settled state rule and should have been anticipated (pp. 16-17). Respondents asserted that the doctrine of *Brenner v. City of Los Angeles* (1911), 160 Cal. 72, 116 P. 397, upon which petitioner had expressly relied, was not overruled herein but applied to a situation of "exempt" property. They contended that petitioner's property was not exempt (pp. 9-11); therefore, no *new* procedural requirement had been applied *retroactively* and no violation of petitioner's right to due process had occurred.

On October 20, 1950, the California Supreme Court construed the judgment below contrary to respondents' representation. By unanimous decision in *City and County of San Francisco v. San Mateo County*, 36 Adv. California 136, 22 P. (2d) 860 (which became final on November 20, 1950), it held "exempt" property of a governmental agency was not relieved from an illegally levied tax thereon *unless* the governmental agency first applied to a board of equalization for *affirmative* correction of the assessment. The California court relied solely upon the decision herein. It said (222 P. (2d) 862-3):

> "It therefore appears . . . that the fill which raised the level of the land for use as an airport . . . was an improvement 'constructed' by the city and therefore *exempt from taxation* under the constitutional amendment . . . In the recent case of *Security-First National Bank v. County of Los Angeles*, 1950, 35 Cal. 2d ....., 217 P. 2d 946, 947, this court stated: 'It is the general rule that a taxpayer seeking judicial relief from an erroneous assessment must have exhausted his remedies before the administrative body empowered initially to correct the error . . . An exception is made when the at-

tempted assessment is a nullity because the property is either tax exempt or outside the jurisdiction . . . But resort to the board of equalization is not rendered unnecessary by the fact that, as in the present case, the error is one in the classification of property and the tax is assailed on the ground that it is in violation of constitutional mandates . . . The State Board of Equalization has the power 'initially' to make a correction of the error alleged in this case, and the facts do not bring it within any exception noted in the authorities cited. It is not claimed that the assessment is a nullity in toto. An adjustment is sought by virtue of an erroneous inclusion of exempt improvements with *taxable* lands." (Our emphasis.)

From 1911 until the decision herein, the unquestioned rule in California, as stated in the *Brenner* case (116 P. 399), was as follows:

> "it is time to *renounce* the doctrine that money paid under protest for taxes on property *not liable to assessment* cannot be recovered unless application is made for correction of the assessor's record before the period of equalization fixed by law has passed." (Our emphasis.)

In that case, the assessor included in Brenner's real property assessment the "exempt" portion thereof, represented by the mortgage thereon owned by the State Board of Regents, a governmental agency. Factually, the case was the exact counterpart of the *San Mateo* case. By reason of its subsequent interpretation, the judgment herein admittedly reversed the *Brenner* rule in effect since 1911. Petitioner could not have anticipated that nine years later that rule would be reversed *retroactively* so as to prevent petitioner from making the newly-required appearance before the Board of Equalization. In so do-

ing, the California court denied petitioner due process of law.

2. As now construed in the *San Mateo* case, the judgment below constitutes a grave obstacle to the conduct of governmental activities of a defense nature during the present acute international emergency. Without question, it will again be necessary during this emergency for the Government to install machinery and equipment, owned by it or its agencies in private defense plants, as occurred during World War II. For such facts, see: *Reconstruction Finance Corporation v. Beaver County*, 328 U. S. 204, 206-208; *United States v. Allegheny County*, 322 U. S. 174, 178-179.

Application of the rule enunciated in the judgment below, as confirmed in the *San Mateo* case, will require the Government and its agencies to employ personnel to check all local assessments made of California defense plants in which government-owned property is located, to ascertain whether or not illegal assessments have been made of "exempt" property and thereafter to make, on behalf of the Government, innumerable appearances before local boards of equalization to prevent collection of local taxes illegally imposed upon such "exempt" Government property. These boards sit simultaneously in all counties in July, five months *before* local tax bills are issued. Their sessions are limited by state statutes to a two-week period. Protection of the interests of the Government would thus entail a tremendous use of manpower, both civilian and military, more properly directed to the defense effort itself.

In addition, claimed right of local entities to tax such "exempt" property of the Government through discriminatory practices sustained in this and companion Case 361 will greatly increase the cost to the Government, and its

taxpayers, of such defense effort. Information furnished us by official sources indicates that attempted discriminatory taxation on similar "exempt" government-owned property during World War II involved claimed local taxes against governmental agencies aggregating hundreds of millions of dollars.

Conclusion.

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Supreme Court of the State of California.

Respectfully submitted,

W. SUMNER HOLBROOK, JR.,
EDMUND NELSON,
Counsel for Petitioner.

Certificate of Counsel.

We hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 33 of rules of this Court.

W. SUMNER HOLBROOK, JR.,
EDMUND NELSON,
Counsel for Petitioner.